Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KENNETH SPOOR,
Petitioner,

v.

WILLIE BIGFORD, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) If a deputy sheriff has seized a truck, and the seizure was not unlawful based on clearly established law and the information the deputy possessed, can a Court of Appeals ignore the ruling in *Anderson v. Creighton*, 483 U.S. ____, 107 S. Ct. ____, 97 L.Ed.2d 523 (1987) to hold the deputy individually liable?

(2) If a sheriff's captain gives an order to a deputy to seize a truck, and the order was not unlawful based on clearly established law and the circumstances of the case, can the deputy be held individually liable for obeying the order?

LIST OF PARTIES

The following persons were parties in the United States Court of Appeals for the Fifth Circuit:

Willie Bigford, Jr., plaintiff-appellant;

Galveston County, a political subdivision of the State of Texas, defendant-appellee;

Joe Max Taylor, Sheriff of Galveston County, defendant-appellee;

Tommy Hansen, a deputy of Taylor's, defendant-appellee;

Art Chapa, a deputy of Taylor's, defendant-appellee;

Kenneth Spoor, a deputy of Taylor's, defendant-appellee.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	II
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER KENNETH SPOOR'S PLEADED DEFENSE OF QUALIFIED IMMUNITY.	5
Qualified immunity was at issue before the District Court.	5
The Court of Appeals refused to consider qualified immunity.	6
Clearly established law authorized the seizure.	7
There was no "clearly established" law that the lack of a computer report of theft would dissipate other probable cause for a seizure.	8
There was no clearly established law requiring a consideration of value in determining probable cause.	11
A vehicle's value is not logically related to a determination of whether all or part of the vehicle may be stolen.	11
A choice between equally consistent conclusions cannot be unreasonable.	13
II. THE COURT OF APPEALS ERRED BY FAILING TO RECOGNIZE SPOOR'S IMMUNITY FOR FOLLOWING AN ORDER THAT WAS NOT CLEARLY UNLAWFUL.	13
Prior precedent established qualified immunity for Spoor.	13
CONCLUSION	15

	Page
APPENDIX A — Fifth Circuit Opinion	1a
APPENDIX B — District Court Opinion and Judgment	23a
APPENDIX C — Fifth Circuit Judgment (January 5, 1988)	32a
APPENDIX D — Fifth Circuit's Denial of Petitioner's Petition for Rehearing (March 10, 1988)	34a
APPENDIX E — District Court Joint Pretrial Order	35a

TABLE OF AUTHORITIES

CASES

	Page
Anderson v. Creighton, 483 U.S. ____, 107 S. Ct. ____, 97 L.Ed.2d 523 (1987)	5, 6, 9
Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972)	14
Bigford v. Taylor, 834 F.2d 1213 (5th Cir. 1988)	1, 3, 4, 7, 11, 12
Harris v. United States, 390 U.S. 234, 88 S. Ct. 992, 19 L.Ed.2d 1067 (1968)	8
Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L.Ed. 2d 271 (1985)	5, 6
Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963)	14
Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982)	10
State v. Lee, 302 Minn. 382, 225 N.W.2d 14 (1975)	9
Torname v. Phair, et al, Cause No. 81-0224-MA, (D. Mass., Oct. 30, 1981)	10
U.S. v. Forrest, 620 F.2d 446 (5th Cir. 1980)	7, 8
U.S. v. Kelly, 547 F.2d 82 (8th Cir. 1977)	9
U.S. v. Miller, 608 F.2d 1089 (5th Cir. 1979)	8
Vela v. White, 703 F.2d 147 (5th Cir. 1983)	13

OTHER AUTHORITIES

U.S. Const. amend. 4	2
15 U.S.C. § 1403	11
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2101(c)	2
42 U.S.C. § 1983	2
Tex. Rev. Civ. Stat. Ann. art. 6687-1, § 49	7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court:

Petitioner Kenneth Spoor respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on January 5, 1988, Petition for Rehearing denied March 10, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988), and is attached as

Appendix A. The decision of the district court is unreported. Copies of the opinion and the judgment are attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals, entered on January 5, 1988, is attached as Appendix C. On March 10, 1988, the Court of Appeals denied Petitioner's Petition for Rehearing, attached as Appendix D. This petition for writ of certiorari is filed within ninety days after that denial, as allowed by 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Just after dawn on July 13, 1982, in a rural area of Galveston County, Sheriff's deputy Kenneth Spoor observed a pickup truck beside the road (PX #21, p. 11). Approaching the vehicle, which appeared to be abandoned, Spoor discovered Willie Bigford, Jr. lying in the cab (*Id.* p. 6). Spoor knocked on the window and Bigford got out (*Id.* p. 10).

When Bigford opened the door Spoor noticed a required Federal Inspection Safety Sticker (FISS) was missing (*Id.* pp. 6, 12). He notified his supervisor, as he had been trained (*Id.* pp. 14, 17). Sergeant Cook arrived, and from that point on Spoor was "following his orders" (*Id.* pp. 14, 36).

Cook inspected the pickup (*Id.* p. 14). He found someone had tampered with the rivets attaching the plate containing the vehicle identification number (VIN) (*Id.* pp. 14-15). He tried to locate the VIN numbers on the frame and could not (*Id.*). Spoor meanwhile ran a computer search on the VIN number from the plate, as well as the license plate number, which listed neither as reported stolen (*Id.* pp. 15, 17-18).

Cook called Captain Ray Lease, who was well aware that even if neither the VIN nor the license was stolen, the vehicle to which they were attached could be (Tr. 171-172). Lease ordered the vehicle towed to the North Galveston County Building, where he was (PX #21 pp. 15-16). This crucial fact was inexplicably ignored by the Court of Appeals, which asserted that Spoor and Cook had the vehicle towed directly to a private storage yard; *Bigford v. Taylor*, supra, at 1216.

At the North County Building Lease directed further inspection of the vehicle (PX #21 p. 19). He concluded the FISS was missing, the rosette rivets holding the VIN plate on the door jam tampered with, the engine number removed, and he could locate no VIN on the frame (PX #23 pp. 8-9). The option sheet normally located in the glove box was missing, as was the one normally found under the seat (*Id.* p. 11). He ordered the truck seized because in his opinion the truck had definitely been altered (*Id.* p. 10), and further investigation was needed to determine if all or part of the truck was stolen (*Id.* p. 31).

The district court held there was probable cause for a constitutionally permissible seizure of the truck (R. 11). The Court had no occasion to consider Spoor's pleaded defense of qualified immunity, since it concluded he had done nothing which violated Bigford's Fourth Amendment rights.

The Court of Appeals disagreed. It maintained that "considering the contradictory set of facts available to the officers at the time, the seizure of the truck without further inquiry was unreasonable." *Bigford,* supra, at 1220. The "contradictory" facts were: 1) the lack of a computer report that a vehicle with the same VIN or license was stolen; and 2) the general deteriorated condition of the truck.

Finding the seizure unreasonable, the Court of Appeals held that of the five defendants, Spoor alone was liable to Bigford for damages, and remanded for a determination of those; *Id.* at 1221, 1223.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER KENNETH SPOOR'S PLEADED DEFENSE OF QUALIFIED IMMUNITY.

Qualified immunity was at issue before the District Court.

The parties agreed in their joint pretrial order that the "individual defendants are immune from personal liability for damages so long as their conduct did not violate clearly established rights of which a reasonable person would have known." (Appendix E, p. 16) This agreement recognized the doctrine of qualified immunity pleaded by defendants (R. 116), which "provides . . . protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.Ed.2d 271, 278 (1985).

Qualified immunity was last addressed by this Court in *Anderson v. Creighton*, 483 U.S. ____, 107 S. Ct. ____, 97 L.Ed.2d 523 (1987), a case strikingly similar to the one at bar. It involved an officer's determination of probable cause to request a search warrant. This Court made clear that the test for qualified immunity requires ascertaining whether a reasonable official could have believed the offending acts lawful, in light of clearly established law and the information the acting official possessed; *Id.*, at 532. Referring to precisely the type of determination made by Lease in the case at bar, the Court recognized

> it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable.

Anderson, supra, at 531.

Officer Spoor is entitled to qualified immunity unless a reasonably well-trained officer in his position would have known that the facts and circumstances he was presented with, in light of clearly established law, failed to establish probable cause. *Malley,* supra, at 345, 281; *Anderson,* supra, at 532.

The Court of Appeals refused to consider qualified immunity.

The Court of Appeals ignored qualified immunity and the inquiry into clearly established law, focusing instead on the question of whether the seizure was unreasonable. It concluded the "contradictory" facts meant further inquiry should have been made prior to seizure; thus the seizure was unreasonable.

To arrive at its conclusion the Court of Appeals overlooked portions of the evidence and misconstrued case law. But even if it had determined correctly that the seizure was unreasonable, it failed to ponder whether an officer in Spoor's position could have reasonably come to a different conclusion about the facts, and thus ignored both *Anderson* and *Malley*.

For qualified immunity purposes, the Court should have inquired whether, in light of the circumstances and clearly established law, the seizure was so unreasonable

as to be unlawful. Had it done so, it would not have erred by failing to recognize Spoor's immunity.

Clearly established law authorized the seizure.

In its discussion of *U.S. v. Forrest,* 620 F.2d 446 (5th Cir. 1980), the Court of Appeals overlooked a clear holding authorizing the seizure of Bigford's truck. Officers believed that Forrest was involved in the theft of trailers and their subsequent sale and rental. They stopped him and observed VIN plates were missing from the trailers, which were seized.

The Court of Appeals distinguished *Forrest* because there was additional evidence before the officers indicating criminal activity was ongoing; therefore they were not relying solely on the missing VIN plates to determine probable cause; *Bigford,* at 1219-1220. This analysis disregards an alternative holding in the case.

Removal of the VIN plates was prohibited by Florida law.

> When the agents saw that the plates were missing, they had, if not probable cause to believe the vehicles were stolen, *at least probable cause to believe there had been a violation of Florida law.* Once the agents had probable cause to believe *these* crimes had been committed, seizure of the vehicles without a warrant was permissible. (emphasis added).

Id., at 455.

In this case, removal of the FISS was prohibited by Texas law; Tex. Rev. Civ. Stat. Ann. art. 6687-1, § 49(b). § 49(c) of the same statute made it a crime

to possess, sell, or offer for sale, a motor vehicle that has had the FISS removed.

Forrest held, two years before the events in this case, that police officers who observe that an identification plate required by state law is missing have probable cause to seize the vehicle as evidence of a crime.

That is exactly what Captain Lease authorized in this case.[1] Seizure of this vehicle as evidence of that violation was objectively reasonable based on *Forrest*.

Further, Spoor observed, in plain view, evidence of a crime. In *U.S. v. Miller*, 608 F.2d 1089 (5th Cir. 1979), the Fifth Circuit noted, at 1099, that

> (f)ollowing an unbroken line of authority, we have repeatedly held that where the initial intrusion is not unreasonable, the warrantless seizure of inadvertently-discovered evidence in plain view does not offend the Constitution if it is immediately apparent to the police officer that he has evidence before him.

As noted above, the absence of the FISS was a violation of Texas law. Clearly established law gave Spoor a right to seize that evidence, which he did on instructions from his superior. See generally *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

There was no "clearly established" law that the lack of a computer report of theft would dissipate other probable cause for a seizure.

Ignoring the holding in *Forrest*, the Court of Appeals first noted the computer produced a "no stolen" report,

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1. As indicated by the Offense Report Spoor prepared (PX #2, p. 2), the truck's seizure as "evidence" was "authorized by" Captain Lease.

suggesting this dissipated the indicia of theft legislatively recognized as arising from an altered or missing FISS or VIN.[2] Significantly, it cited two *contradictory* cases on this point.

Discussion of these cases would be pointless.[3] Whether the cases can or cannot be distinguished from the case at bar is irrelevant.

In *Anderson* this Court held that

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must have been sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson, supra at 531. Two cases, neither with a fact pattern similar to the case at bar, with contradictory

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2. *Bigford,* supra at 1218.

3. Read carefully, the case relied upon by the Court of Appeals is not on point. *U.S. v. Kelly,* 547 F.2d 82 (8th Cir. 1977) held only that there was no probable cause to search a car parked legally outside a hotel room when there was no indication it was stolen and no computer report of its theft. Its application in this case, where there were other indications of theft, is inappropriate.

Nor can the contradictory case be so readily distinguished as the Court suggests. *State v. Lee,* 302 Minn. 382, 225 N.W.2d 14 (1975), indicates that the lack of a theft report is a factor to be weighed against others to determine probable cause, and is not in itself dispositive of the issue.

The Court of Appeals distinguished *Lee* by observing that the officers had reason to discount the lack of a theft report because there was an indication that the theft was recent. Lease, like the officers in *Lee,* had good reasons to discount the lack of any report of theft. Overlooked was his testimony (Tr. 171-172) that the lack of stolen report meant nothing since it could well be that the VIN number and the license plate were not stolen, but everything else on the vehicle was. He had in fact seen cases of that sort, and it was in his mind that Bigford may have purchased such a vehicle.

holdings, do not establish the legal contours defining when the lack of a theft report dissipates any probable cause which may otherwise exist to seize an object.

Further, such contours as existed included a contemporary case with a similar fact pattern directly supporting the seizure. *Torname v. Phair, et al,* is an unreported opinion in cause No. 81-0224-MA from the United States District Court of Massachusetts, dated October 30, 1981, which is available through Lexis.

In that case a state trooper seized a motorcycle because the VIN number appeared to have been altered. On motion for summary judgment, the Court noted there were no disputed facts indicating the officer acted without probable cause, and dismissed the case against him based on qualified immunity.

Significant is a district court's obvious conclusion that, as the law existed in 1981, probable cause existed to seize on the basis of the altered VIN number alone.

As the Fifth Circuit noted the same year as the events herein were unfolding,

> Certainly we cannot expect our police officers to carry . . . a Decennial Digest on patrol; they cannot be held to . . . a legal scholar's expertise in constitutional law.

Saldana v. Garza, 684 F.2d 1159, 1164-65 (5th Cir. 1982). The decision in this case demands such expertise from officers like Spoor and Lease.

There was no clearly established law requiring a consideration of value in determining probable cause.

Second, the Court of Appeals asserted that the general deteriorated condition of the truck "tended to negate the reasonableness of the conclusion that a truck of such little worth had been stolen," and outweighed the suspicious circumstances created by the missing FISS and the altered or missing VINs. The Court also viewed the conclusion that these were missing as the result of deterioration as "at least as consistent" with the known facts as was a conclusion that the truck or parts of it may have been stolen; *Id.*[4]

The Court of Appeals did not cite any case law or statute requiring officers to consider the value of a vehicle in determining whether it might be stolen, and indeed there is none. Neither Spoor nor Lease violated clearly established law by failing to consider the value of Bigford's truck.

A vehicle's value is not logically related to a determination of whether all or part of the vehicle may be stolen.

Further, the assumption underlying the Court of Appeal's argument, that vehicles of "such little worth"

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4. The Court suggests that the FISS may have fallen off and the VIN plate loosened from heavy wear and tear; *Bigford,* supra at 1219. The Court conveniently ignored the evidence that the rivets "appeared to have been tampered with." (PX #23, pp. 8, 11, 14). For purposes of evaluating probable cause to seize, that is a far different thing than appearing to be "loose." And the FISS is required by Federal law to be "permanently attached." 15 U.S.C. § 1403. There was no evidence that these "fall off."

are not likely to be stolen, is highly questionable. It is sophistry which ignores the practical considerations upon which it purports to be based.

There is an appearance of rationality to the idea that one would not steal something of little value. But thieves do not necessarily act from entirely rational precepts, and profit is certainly not the only motive for theft. Items may be stolen for personal use with no thought of value. Persons of few means may find theft far more convenient than paying for replacement parts. The transmission of Bigford's vehicle was mounted on pieces of wood,[5] which could reasonably be construed as evidence that it was a transmission which did not belong in the vehicle, and was therefore quite probably stolen.

Innocent persons may certainly be duped into purchasing vehicles all or part of which may be stolen. Lease testified at trial this possibility was on his mind when he decided to seize the truck but not charge Bigford criminally (Tr. 171-172).

For purposes of qualified immunity it matters not whether the argument of the Court of Appeals is accepted or rejected. The point is, there are equally reasonable counter-arguments that arise from the same facts which a reasonable police officer could have believed established further probable cause rather than dissipating it. Thus, in terms of objective reasonableness, Lease's decision to seize the truck was, as the Court of Appeals noted, "at least as consistent" with the known facts as the conclusion that he should not have done so.

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5. *Bigford v. Taylor,* supra, at 1215.

A choice between equally consistent conclusions cannot be unreasonable.

A police officer is faced with two alternative conclusions, one "at least as consistent" with the known facts as the other. Surely he must be free to choose either conclusion without risking liability if a Court later decides the one he chose was objectively unreasonable. This is precisely the type of judgment call protected by the doctrine of qualified immunity set forth by this Court. Spoor is entitled to qualified immunity even if the Court agrees that Lease was mistaken in his judgment that probable cause to seize the vehicle existed.

II. THE COURT OF APPEALS ERRED BY FAILING TO RECOGNIZE SPOOR'S IMMUNITY FOR FOLLOWING AN ORDER THAT WAS NOT CLEARLY UNLAWFUL.

Prior precedent established qualified immunity for Spoor.

It cannot be over-emphasized that one of the circumstances confronting Spoor was a direct order from his Captain to seize the truck. Spoor has been held individually liable for obeying.

In *Vela v. White*, 703 F.2d 147 (5th Cir. 1983) the 5th Circuit granted qualified immunity to an officer who, on the order of his superior, arrested a citizen without probable cause. The officer had been a police officer for less than a year, and he acted on a direct order from his superior, who was the ranking officer on duty. Noting that in 1983 the

> question of whether an officer is liable for arresting a citizen when following the direct orders of his superior *is not clear and settled* . . . (emphasis added)

the Court found that

> it would not be fair to force Salazar to either violate a direct order or else stop and interrogate Byrd (his superior) as to the reasons for his order, at the risk of being held liable for damages for an unlawful arrest.

Id. at 152.[6]

The same fairness must be extended to Kenneth Spoor. On the force for less than a year, as a reserve deputy (PX #21 p. 8), Spoor followed the direct order of his Captain to seize the truck. Spoor's testimony was taken on January 13, 1984. His lack of culpability was then well known to Bigford, as reflected by his counsel's closing questions:

> Q: So, once Sergeant Cook arrived on the scene, then, you were following his orders?
>
> A: Yes, sir.
>
> Q: Okay. And did you do anything independently of what he was telling you to do from that point on?
>
> A: No, sir.

Id. at 36.

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6. In determining that the law was unclear in 1983, the Court compared *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963) with *Anderson v. Nosser*, 456 F.2d 835 (5th Cir. 1972). If the law was unclear in 1983 it was certainly so on July 13, 1982.

This testimony was then introduced as plaintiff's Exhibit #25—Bigford's version of what happened and how Spoor was involved. Bigford's uncontradicted evidence clearly demonstrates Spoor did not make the decision to seize the truck, and he should not be held liable for that decision.

CONCLUSION

The Court of Appeals found that Kenneth Spoor is liable for the damages caused Willie Bigford by the wrongful seizure of his truck, dispite Spoor's qualified immunity. Unless that ruling is reversed, Spoor will be denied the benefit of the immunity to which he is so clearly entitled under well-established precedent of this Court. In view of the agreed applicability of the qualified immunity doctrine and the undisputed facts, Spoor is entitled to a per curiam reversal of the Court of Appeals' decision, and entry of judgment by this Court that he is entitled to qualified immunity.

Respectfully submitted,

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APPENDIX A

Willie BIGFORD, Jr.,
Plaintiff-Appellant,

v.

Joe Max TAYLOR, Individually and as Sheriff of Galveston County, Texas, et al.,
Defendants-Appellees.

No. 87-2334.

United States Court of Appeals,
Fifth Circuit.

Jan. 5, 1988.

Truck owner commenced § 1983 action against county, county sheriff, and deputy sheriff alleging violation of Fourth Amendment rights in seizure of truck and violation of due process rights for delay in resolving seizure and returning truck. After remand, 784 F.2d 1111 (unpublished opinion), the United States District Court for the Southern District of Texas, Hugh Gibson, J., entered judgment for defendants, and truck owner appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) truck was seized without probable cause in violation of Fourth Amendment; (2) sheriff was not liable for actions of his deputy in illegally seizing truck; and (3) county was not liable for due process violations occasioned by magistrate's delay in adjudicating ownership of truck.

Affirmed in part, reversed in part, and remanded.

Beatrice Mladenka-Fowler, Nelson, Locke & Fowler, Houston, Tex., for plaintiff-appellant.

Scott Lyford, Galveston County Legal Dept., Galveston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GEE and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Galveston County sheriff's police towed and kept a young man's battered pickup truck on the suspicion that it might once have been stolen because certain identification stickers were missing or appeared to have been altered. Although the police soon decided that the truck had not been stolen, and the owner repeatedly sought return of his truck, the county justice of the peace did not order that it be returned until almost five months later. By that time, the owner had lost his job because he could not drive to work, and the storage fees amounted to almost the value of the truck. Frustrated in his every attempt to obtain relief from Galveston County, the young man sued the county, the sheriff, and the officers who had seized the truck. The district court dismissed all claims, ruling that the police had probable cause to seize the truck, the young owner had notice of the available remedies and so was not denied due process, and the county and the sheriff could not be charged for the magistrate's failure to return the truck. We affirm the holdings that the county and the sheriff may not be held liable. Because, however, the officers lacked probable cause to seize the truck originally, we reverse on this

claim against one of the officers sued in his individual capacity, and we remand for the district court to determine damages.

I.

Willie Bigford, an 18 year old, had a young American's dream: a vehicle of his own. He also had energy and thrift. He worked part time after school and during holidays and saved his money. With $1,500 thus accumulated, he bought a second-hand pickup truck from his boss. The truck was beat up, rusty, and badly in need of paint, and its transmission rested precariously under the hood on two two-by-fours. Still, Bigford was able to drive the truck to work every day, and he planned to paint it and fix it up when he had the time and money.

While driving to work in his truck before dawn on July 13, 1982, Bigford ran out of gas on a country highway near Galveston, Texas. He walked to the nearest gas station, found it still closed, and returned to the truck to wait until the station opened. While waiting, he dozed off in the truck.

Kenneth Spoor, a Galveston County sheriff's deputy on patrol, saw Bigford's truck parked beside the road. He approached it to investigate and, seeing Bigford lying down in the cab, knocked on the window and motioned for him to step outside. When Bigford opened the door, Deputy Spoor glanced at the vehicle body facing the end of the door and noticed that the Federal Inspection Safety Sticker that was supposed to be affixed there was missing. Display of this sticker, which certifies that the vehicle meets federal safety standards, is required by federal law.[1]

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1. 15 U.S.C. § 1403 (1982).

Deputy Spoor had been trained to notify a supervisor when he found a vehicle whose federal safety sticker was missing. He called a Sergeant Cook, who arrived and inspected the truck further. Sgt. Cook found other suspicious signs in addition to the missing sticker. He thought that someone had tampered with the rivets on the plate, also located in the door panel, that contained the truck's vehicle identification number (VIN). He also thought that the body of the truck did not appear to match its frame, and when he looked under the hood to find the VIN, which is often stamped there, he could find no number.

Using his radio to order a computer check from a nationwide data base, Deputy Spoor learned that no theft complaint had been lodged for a vehicle with the truck's VIN or license tags. Neither Sgt. Cook nor Deputy Spoor asked Bigford if the truck was stolen or if he had proof of ownership, although Bigford had produced a valid driver's license upon Deputy Spoor's request. Had the officers asked for proof of ownership, Bigford could have produced from the truck's glove compartment a notarized title certificate, showing the transfer of the truck to him from its previous owner, his employer. He had not, however, mailed these papers to the state agency responsible for recording the transfer of title.

At no time did the officers seriously suspect Bigford of stealing or tampering with the truck, and they never arrested him or charged him with possession of a stolen vehicle. They did not telephone Bigford's employer or attempt to verify the fact that he was a local resident. Instead, and in spite of the computer report, they decided to tow the truck to a privately owned storage yard for

further investigation. From previous experience, they knew or should have known that the owner of this business would charge Bigford for storage of the vehicle, whether or not the investigation ultimately determined the truck was Bigford's. When Bigford's mother arrived at the police station to pick up her son, the officers told her that they had to investigate the missing sticker and that she should call them in two days if she had not heard from them.

During the next two weeks, Bigford and his parents made a series of unsuccessful attempts to find out why the police were continuing to hold his truck. The police told the Bigfords several times that they had no new information and that the investigation would take 30 days or more. The investigation, which the district court found in fact took about two months, may be described charitably as perfunctory. The police performed a title search, which revealed a clear chain of title down to Bigford. By the time the police had completed this task, the Bigfords had searched the title themselves and obtained the same result. Without judicial authority or permission from Bigford, the police cut a hole in the floorboard of the truck in an attempt to find the VIN. Eventually, that number was discovered on the engine frame, apparently overlooked by the officers when they seized the truck. Based on these results, the police concluded the truck was not stolen, but they said nothing to Bigford.

In the meantime, by virtue of Texas law, custody of the truck had passed almost immediately from the police to Judge James Buckner, a county justice of the peace. When Texas police seize a vehicle alleged to have been stolen, they file an inventory of its contents with a justice

of the peace, who is required to hold a hearing to determine the rightful owner.[2] The district court found that Judge Buckner's office received the inventory on July 14, the day after the seizure, although it does not appear that the police ever filed a formal charge that the vehicle had been stolen. The Bigfords received no notice or citation advising them that the matter was in the hands of the justice of the peace.

Although he had received the inventory in July, Judge Buckner took no action of any kind until almost three months later. Sometime between October 13 and 21, he finally placed the matter on his docket. During the three months that the file sat on his desk, the truck sat in storage, accruing fees at something between $3 and $5 a day.

The Bigfords did not actually learn that the courts had custody of the truck until July 28, when, on a visit to the sheriff's office, they were told so by Deputy Tommy Hansen, the officer conducting the investigation. Hansen did not, however, specify which court had jurisdiction over the truck. He did advise the Bigfords to hire a lawyer. The Bigfords hired two over the next six weeks, but neither took any action. Finally the Bigfords decided to locate the right court on their own. After being directed to the wrong magistrate, the Bigfords were again set straight by Tommy Hansen, who directed them to Judge Buckner and also explained that it was up to them to petition the judge for return of the truck.

In mid-September, the Bigfords met with Judge Buckner and an assistant district attorney. The judge told the Bigfords he could not act until they petitioned for a

2. Tex. Code Crim. Proc. Ann. arts. 47.01-11 (Vernon's 1979).

hearing; like Hansen, he suggested they retain a lawyer. The Bigfords hired their third lawyer, Kent Schaffer, in October. Schaffer arranged a hearing with Judge Buckner for November 4; this was postponed to November 18.

At the "hearing," an informal meeting in Judge Buckner's office, the judge could not locate a file or any papers on Bigford's case. The assistant district attorney attending the conference, who was unfamiliar with the case, told the Bigfords they could get the truck back—if they paid towing and storage fees, which by then amounted to $700 or $800. When Schaffer replied that Bigford could not afford to pay the fees, Judge Buckner said he could do no more and that the Bigfords would have to work things out with Tommy Hansen, who, it turned out, was away on vacation until December 1. The judge declined to hold another hearing unless Hansen was present together with a representative from the district attorney's office who knew the case.

The Bigfords waited until Tommy Hansen returned, but he merely offered to return the truck if Bigford would pay the storage fees. At this point, it appears, Bigford gave up on Galveston County. He made no further requests for the truck, but instead filed this civil rights action for damages in February 1983, alleging that the county, Sheriff Taylor, and three deputies had deprived him of his truck in violation of the Fourth Amendment and without due process of law.

In March 1983, in the midst of discovery for their lawsuit, the Bigfords learned that some four months earlier, on December 2, Judge Buckner had ordered the truck returned to them. Neither the Bigfords nor their attorney had been served with notice that judgment had been

entered in their favor. The Bigfords did not finally regain possession of the truck, however, until December 1985, fully three years later, after they had obtained a waiver of the storage fees. By that time, the truck had rusted badly, could not be started, and had been damaged when Hurricane Alicia struck the Gulf Coast. It was worth about $100 in scrap value.

The course of this lawsuit is only slightly less confused than the events that occasioned it. The defendants first justified their seizure of the truck on the basis of § 49(d) of the Texas Certificate of Title Act, which authorizes impoundment of a vehicle whose driver is arrested for failure to display the required identification numbers.[3] Bigford amended his complaint to include an attack on the constitutionality of this provision. The district court upheld the statute and granted summary judgment. This court reversed and remanded in an unpublished opinion in February 1986, 784 F.2d 1111, pointing out that this section was "patently" inapplicable because the police had never arrested Bigford as the statute required.

On remand, the defendants argued that the seizure was authorized under Chapter 47 of the Texas Code of Criminal Procedure, which provides for the seizure and determination of ownership of property "alleged to have been stolen,"[4] even though it appears the police had made no formal allegation that the truck had been stolen. The district court held a bench trial and then entered judgment for the defendants based on its findings of fact and conclusions of law.

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3. Tex. Rev. Civ. Stat. Ann. art. 6687-1, § 49(d) (Vernon's 1977).

4. Tex. Code Crim. Proc. Ann. art. 47.01 (Vernon's 1979).

The district court ruled that the police had probable cause to seize the truck based on the missing sticker and the indications that the VIN might have been altered. Turning to Bigford's due process claim, the court first found that, because the police had probable cause to seize the truck, due process required only a post-deprivation hearing. Because the police filed an inventory with the justice of the peace, within 24 to 48 hours, the court found, Bigford was accorded an adequate opportunity for a prompt hearing. The court ruled that Bigford had notice that his remedy lay with the courts and that he, therefore, had failed to make use of the remedy provided him. Finally, the court held, the failure, if any, of the justice of the peace to carry out his legal duties could not be imputed to the county or the sheriff's police.

II.

Although Bigford has presented his contention that the seizure was probable cause as one stitch in the fabric of his due process claim, he has also preserved his claim that the seizure violated the Fourth Amendment. His complaint casts his allegations in that form, among others, and all concerned have analyzed the case employing principles under the Fourth Amendment as well as under the Due Process Clause. Bigford's failure, therefore, to couch his argument on appeal expressly in Fourth Amendment terms does not prevent us from thus addressing it. The district court found that the police had probable cause to seize the truck because its federal safety sticker was missing and its VIN had apparently been altered, concluding that such a vehicle is likely to be stolen.

Bigford and the county here renew their debate over whether the federal safety sticker was required by state

law. The answer to this question does not determine whether the police had probable cause to seize the truck. Indeed, the county admits that the issue is not whether the sticker was required but whether its absence, together with other facts, gave the police probable cause to believe the vehicle or a part of it was stolen.

[1] Probable cause exists "when the facts and circumstances within the arresting officer's personal knowledge, or of which he has reasonably trustworthy information, are sufficient to occasion a person of reasonable prudence to believe an offense has been committed."[5] A showing of probable cause requires much less evidence than does a finding sufficient to convict.[6] Moreover, probable cause is to be determined on the basis of the facts available to the officers at the time, without reference to whether the evidence ultimately proved to be reliable.[7] In short, we are not authorized to second-guess the conduct of the police with the benefit of our knowledge, gained from later developments, that the evidence eventually turned out to be unfounded or proved insufficient to show commission of a crime. As the Supreme Court stated in *Brinegar v. United States,* when dealing with probable cause, "we deal with probabilities. These are not technical; they are the factual and practical considerations of

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5. *United States v. Forrest,* 620 F.2d 446, 453 (5th Cir. 1980) (*citing Draper v. United States,* 358 U.S. 307, 79 S. Ct. 329, 3 L.Ed. 2d 327 (1959)); *United States v. Ashcroft,* 607 F.2d 1167, 1170 (5th Cir. 1979).

6. *United States v. Irurzun,* 631 F.2d 60, 62 (5th Cir. 1980) (*quoting Ashcroft,* 607 F.2d at 1170).

7. *See, e.g., United States v. Covelli,* 738 F.2d 847, 854 (7th Cir. 1984); 1 W. LaFave, *Search and Seizure* 3.2(d) at 575-76 (1987).

everyday life on which reasonably and prudent men, not legal technicians act."[8]

[2, 3] Nevertheless, the probable cause standard is not entirely toothless. It requires not merely a reasonable suspicion that a crime has been committed,[9] but a reasonable basis under the circumstances for reaching that conclusion and for acting on it. As a corollary, moreover, of the rule that the police may rely on the totality of facts available to them in establishing probable cause,[10] they also may not disregard facts tending to dissipate probable cause.

[4] We agree with the district court that § 49(d) of the Texas Certificate of Title Act reflects a legislative judgment that alterations on an identification sticker indicate an increased likelihood that the vehicle is stolen. The purpose of that Act, as construed by Texas courts, is to stop the purchase and sale of stolen vehicles.[11] Considering the facts known to the police and available to them on reasonable inquiry at the place where the truck was seized, however, officers acting reasonably and prudently on the basis of all the available information, and familiar with the practical considerations of everyday life, would not have concluded that the truck had been stolen. At the time the police seized the truck, the missing

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8. 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L.Ed. 1879 (1949); *see also Forrest*, 620 F.2d at 453.

9. *Cf. Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

10. *United States v. Fooladi*, 703 F.2d 180, 184 (5th Cir. 1983); *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977).

11. *Drake Ins. Co. v. King*, 606 S.W.2d 812 (Tex. 1980); *Guinn v. Lokey*, 151 Tex. 260, 249 S.W.2d 185 (Tex. 1952).

sticker, the apparent alterations to the VIN on the doorjamb, and the fact that Sgt. Cook could not find the VIN on the engine block provided at most a basis for further investigation.

A reasonable police officer would have been placed on notice that further inquiry was indicated when the nationwide computer search produced no report that the vehicle matching either the VIN or the license plates on Bigford's truck had been reported stolen. Although this fact has been held insufficient to render a seizure unconstitutional when probable cause otherwise existed,[12] other authority recognizes it as an important factor militating against a finding that probable cause exists.[13]

Moreover, *State v. Lee*, the state court case that refused to hold that a computer report of "not stolen" dissipated probable cause, presented a different situation. The court there argued that the fact that the computer report indicating that the property—in that case, automobile tires—had not been stolen was "not necessarily a fact to be weighed against the others because if the theft was recent, as the snow on the tires suggested, then it would be unlikely that such a report would have been made by them."[14] In contrast, here the police could not have reasonably dismissed the negative report on the basis that the theft was recent, for as they have admitted all along, they never had any serious suspicion that the young man driving the truck had stolen it or tampered with the identification numbers, or had any idea who had committed those acts.

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12. *State v. Lee*, 302 Minn. 382, 225 N.W.2d 14 (1975).

13. *United States v. Kelly*, 547 F.2d 82, 84 (8th Cir. 1977).

14. *Lee*, 225 N.W.2d at 16.

Minimal further investigation, moreover, would have reduced any suspicion created by the facts the police had discovered. As Tommy Hansen, the sheriff's department's investigator, testified, it was obvious that the truck had been "just beaten around, beaten to death." It was already rusted and badly in need of paint, and from their brief investigation under the hood, the officers could have seen that the transmission was mounted inside on two-by-fours. The age and condition of this vehicle and its evident lack of value or ultility should have been considered, and these facts tended to negate the reasonableness of the conclusion that a truck of such little worth had been stolen. Even apart from the computer report, then, the "suspicious circumstances" that the officers had before them were at least as consistent with the conclusion that the sticker had fallen off and the VIN plate had loosened from heavy wear and tear as they were with the conclusion that the truck had been stolen or wrongfully tampered with.

United States v. Forrest,[15] on which the defendants rely, is clearly distinguishable. In *Forrest,* the police seized the defendant's truck trailer as he was driving it away from his house, on the suspicion that he was using it to transport stolen eggs. The police had been watching Forrest's home because of an array of facts indicating he was involved in such a scheme. Forrest already had a reputation as a trafficker in stolen goods. He had leased several trailers to a company and had provided false VINs on the trailers in the course of that transaction. He had obtained certificates of title on several of the trailers by presenting false bills of sale to a Florida state agency. Finally, the trailer parked in Forrest's dirveway, which

15. 620 F.2d 446 (5th Cir. 1980).

the police eventually seized, matched closely the description of a trailer stolen in Georgia and believed to have been brought to the area where Forrest lived.

The police in *Forrest* had ample reason to believe a crime was afoot, and no information they received contradicted that belief.[16] Here, considering the contradictory set of facts available to the officers at the time, the seizure of the truck without further inquiry was unreasonable.

III.

That the officers violated the Constitution in seizing Bigford's truck does not, of course, establish that the defendants sued here are liable to Bigford for damages even though a farcical series of blunders followed. Officer Chapa, the district court found, never took any action, but merely stood and watched while Sgt. Cook and Officer Spoor searched and impounded the truck. This finding is not clearly erroneous.

[5] Nor is Sheriff Taylor liable in his individual capacity. Section 1983 does not impose vicarious or respondeat-superior liability on a police chief.[17] If, as was the case here, the sheriff is not personally involved in the acts causing the constitutional deprivation, the plaintiff must show that some other act by the sheriff caused the violation.[18] The sheriff's connection, if any, will generally be through inadequate supervision, but the plaintiff

16. *Id.; cf. also United States v. Duckett*, 583 F.2d 1309 (5th Cir. 1978).

17. *Hinshaw v. Doffer*, 785 F.2d 1260, 1263 (5th Cir. 1986) (*citing Reimer v. Smith*, 663 F.2d 1316, 1323 (5th Cir. 1981)).

18. *Id.* (*citing Harvey v. Andrist*, 754 F.2d 569, 572 (5th Cir. 1985); *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983)).

then must show that such a failure was grossly negligent and that it caused the violation.[19]

Bigford has not established either fact. Assuming it might be inferred that Sheriff Taylor had instituted a policy of seizing vehicles based on missing or altered identification stickers, Bigford has not shown that such a policy would itself be unconstitutional or that it caused the violation of his constitutional rights in this case. At most, he has shown that the officers misapplied the policy by seizing the truck without probable cause because the computer reported the truck as not stolen and because the stickers could have been damaged or destroyed through general wear and tear.

[6] For similar reasons, the county is not liable for the officers' actions. The Supreme Court has ruled that a local government unit cannot be held liable under Section 1983 "unless action pursuant to official municipal [or county] policy of some nature" caused the constitutional tort of which the plaintiff complains.[20] In particular, "a municipality cannot be held liable *solely* because it employs a tortfeasor"—that is, on a respondeat superior theory.[21] A tangential relation between government policy and the alleged constitutional violation does not establish liability; the policy must be the "moving force" behind the violation.[22] In the case of a single incident of misbe-

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19. *Hinshaw*, 785 F.2d at 1263; *see also Bowen v. Watkins*, 669 F.2d 979, 988-89 (5th Cir. 1982).

20. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 1297, 89 L.Ed.2d 452 (1986) (*quoting Monell v. Dept. of Social Services*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L.Ed.2d 611 (1978)).

21. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036.

22. *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S. Ct. 445, 454, 70 L.Ed.2d 509 (1981); *Monell*, 436 U.S. at 694, 98 S. Ct. at 2038.

havior by a municipal employee, the Court, although divided over the precise standard, has made clear that the municipality may not be held liable "merely on evidence of the wrongful actions of a single city employee not authorized to make city policy."[23]

Bigford has failed to establish the existence of a county policy or custom that was the "moving force" behind the illegal seizure of his truck. While the seizure may have taken place pursuant to a policy of impounding vehicles believed to be stolen on the basis of missing or altered stickers, Bigford has not shown that that policy was itself unconstitutional, nor has he established that anything in the policy or its administration caused the officers to apply it unconstitutionally in this case. Although Detective Tommy Hansen admitted that vehicles impounded because of suspicious circumstances frequently prove not to have been stolen or tampered with, this alone does not establish that Galveston County officers regularly seize vehicles without probable cause, for probable cause need not involve the degree of certainty necessary to establish a criminal violation. Bigford has, moreover, barely raised let alone proven, that the illegal seizure resulted from an inadequate training or supervision program by the sheriff's office[24] or from a custom of recklessness in application of the policy of investigating vehicles.[25] Officer Spoor is the only defendant who may be held liable for the illegal seizure.

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23. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 2441, 85 L.Ed.2d 791 (1985) (Brennan, J., concurring in part and in the judgment).

24. *See Tuttle*, 471 U.S. at 822-24, 105 S. Ct. at 2436 (Rehnquist, J.); *id.* at 828-33, 105 S. Ct. at 2439-41 (Brennan, J.); *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161, 169-70 (5th Cir. 1985).

25. *See Grandstaff*, 767 F.2d at 170-72.

IV.

We now turn to Bigford's claim that the defendants violated his right to due process by failing to return his truck promptly or with a sufficient hearing. We do not reach its merits, because, even assuming a constitutional violation occurred, none of those who are made defendants to this claim may be held liable.

[7] Sheriff Taylor and Tommy Hansen are not liable as individuals. Once the police had sent the papers regarding Bigford's truck to the justice of the peace, responsibility for the disposition of the vehicle passed from their hands. The district court found that the police delivered the papers to Judge Buckner on July 14, one day after the seizure. This finding of fact is not clearly erroneous. Bigford points out that the case was not docketed until almost three months later, but ample evidence supports the district court's determination that Judge Buckner had received the file in July and simply had left it sitting on his desk. Bigford raises no issue concerning whether Judge Buckner lacked jurisdiction because only the inventory and no allegation that the vehicle had been stolen was filed, and we therefore intimate no opinion concerning the possible relevancy of that fact.

[8] The district court, in addition, correctly concluded that the county may not bear liability for the magistrate's acts and omissions. Bigford first argues that Judge Buckner's actions themselves may be directly imputed to the county because under Texas law, justices of the peace are high policymaking officials of counties. In *Pembaur v. City of Cincinnati*,[26] the Supreme Court ruled that a county may be held liable when the county official whose

26. 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452 (1986).

policy decision the plaintiff challenges is "responsible for establishing final policy with respect to the subject matter in question."[27] Before *Pembaur*, this court had emphasized that policymaking authority under *Monell* "is more than discretion, and it is far more than the final say-so, as a matter of practice."[28] The official must have "the authority to define objectives and choose the means of achieving them," not merely the latitude to exercise discretion in pursuing objectives and employing means set by other agents—a latitude "essential even to virtually ministerial tasks."[29]

The county judge of a Texas county may possess such policymaking authority in some matters, as this court intimated in *Familias Unidas v. Briscoe*.[30] As the court there noted, the Texas constitution and statutes give the county judge numerous executive, administrrative, and legislative chores, such as presiding over the county's legislative body, preparing the county budget, and conducting elections, with "virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute" and accountability to "no one other than the voters for his conduct therein."[31] The court concluded that "at least in those areas in which he, alone, is the final authority or ultimate repository of county power," the county judge was a policymaker whose official conduct and decisions could be attributed to the county under section 1983.[32]

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27. *Id.* at 483-84, 106 S. Ct. at 1300.

28. *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (en banc).

29. *Rhode v. Denson*, 776 F.2d 107, 109 (5th Cir. 1985).

30. 619 F.2d 391 (5th Cir. 1980).

31. *Familias Unidas*, 619 F.2d at 404.

32. *Id.*

Judge Buckner, however, was not the Galveston County Judge, but a justice of the peace for one precinct of the county. His job is to adjudicate various small claims such as the question of vehicle ownership presented here, and it does not involve any of the policymaking functions assigned to the county judge.

In *Familias Unidas,* moreover, the particular statute authorizing the judge to act also so narrowed his discretion that, with respect to the subject matter in question, he was effectuating the policy of the State of Texas, not making policy under a standardless grant of authority.[33] The responsibility of the justice of the peace in determining ownership of a vehicle alleged to have been stolen is similarly circumscribed by state law. Article 47.01a of the Texas Code of Criminal Procedure, which governs when no criminal charges are pending and under which Judge Buckner apparently proceeded in this case, provides that, after hearing held on petition of any interested person, "[t]he magistrate shall order the property delivered to whoever has the superior right to possession." While the justice of the peace clearly has de facto discretion over how the cases on the court's docket are to be handled, "policymaking authority is more than discretion, and it is far more than the final say-so, as a matter of practice."[34] Judge Buckner was charged with carrying out Texas's policy that vehicles be delivered, after a hearing, to the rightful owner. His "deliberate or mistaken departure from the controlling law" cannot be said to represent county policy.[35]

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33. *Id.; see also Carbalan v. Vaughn,* 760 F.2d 662, 665 (5th Cir. 1985).

34. *Bennett,* 728 F.2d at 769.

35. *Pembaur,* 475 U.S. at 486, 106 S. Ct. at 1302 (White, J., concurring).

[9] In addition to arguing that Judge Buckner denied due process by failing to convene a prompt hearing, Bigford makes a second claim: that the county should have provided him an opportunity to regain possession of his truck by posting an appearance bond. He relies on this court's decision in *Breath v. Cronvich*,[36] which upheld Louisiana's statute for towing of illegally parked vehicles in part because the statute afforded such a procedure. We regard this as, in substance, a facial attack on the constitutionality of Tex. Code Crim. Proc. arts. 47.01-11, which offer no such option to the driver of a vehicle that is alleged to have been stolen.

Bigford's challenge, construed in this light, raises the question whether implementation of a facially unconstitutional state statute, assuming this statute is so, by the county officers charged with implementing it amounts to a county "policy" under *Monell* and subsequent cases. This court has reached somewhat conflicting results on this issue. In *Familias Unidas*, the court refused to hold the county liable for the conduct of a county judge, holding that the judge's action, "like that of a county sheriff in enforcing a state law, may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility."[37]

In *Crane v. State of Texas*,[38] however, the court held the county liable when its District Attorney instituted a practice of issuing misdemeanor capiases without a neutral magistrate's finding of probable cause. The court dis-

36. 729 F.2d 1006 (5th Cir. 1984).

37. 619 F.2d at 404.

38. 759 F.2d 412 (5th Cir. 1985).

tinguished *Familias Unidas* on two grounds. First, in *Familias Unidas* the defendants had complied with the state statute and should not have faced liability merely because that statute was eventually declared unconstitutional. Second, the judge in *Familias Unidas* was not, under state law, vested with the amount of policymaking discretion that the district attorney had concerning county law enforcement procedures.[39]

Familias Unidas, rather than *Crane,* controls here. Bigford challenges the failure to provide him the option of posting a bond. Although the magistrate may have breached his state-law duty in failing to set a hearing, he did not violate state law in failing to offer Bigford the bond procedure, for arts. 47.01-11 themselves authorize no such procedure. As already noted, moreover, the magistrate is not a county policymaker concerning the matter in question, but is carrying out the policy of the State of Texas.

Finally, although Bigford presented some evidence that Sheriff Taylor was aware of the delay in returning the truck and did nothing to resolve it, the sheriff was not the county's policymaker as to such judicial matters, as opposed to law enforcement matters. There is no evidence that the county's governing body or other high officials approved or were even aware of the magistrate's failure to act.[40]

Because Bigford has failed to establish that the county may be held liable for the delay in resolving the matter and returning the truck, and the other defendants cannot be charged for the magistrate's failures, Bigford may

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39. *Crane,* 759 F.2d at 430 n. 19.

40. *See Carbalan,* 760 F.2d at 664.

not recover damages on his due process claim. We therefore do not consider whether Bigford was denied due process or whether he had adequate notice of the remedies available to him and simply failed to use them.

V.

Because the police violated Bigford's constitutional rights by seizing his truck without probable cause, we remand to the district court to determine the damages to be assessed against Deputy Spoor, the only defendant liable under Section 1983.

The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED. Deputy Spoor is to pay Bigford's costs, while Bigford is to pay the other defendants' costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C.A. G-83-54

WILLIE LEE BIGFORD

v.

JOE MAX TAYLOR, ET AL

FINAL JUDGMENT

The Court having filed its findings of fact and conclusions of law herein directing the entry of judgment in favor of the defendants and against the plaintiff, it is

ORDERED, ADJUDGED and DECREED that the plaintiff TAKE NOTHING from defendants JOE MAX TAYLOR, individually and in his official capacity as Sheriff of Galveston County, Texas, KENNETH SPOOR, ART CHAPA, and TOMMY HANSEN, individually and in their official capacities as Deputy Sheriffs of Galveston County, Texas.

This is a FINAL JUDGMENT.

DONE at Galveston, Texas, this the 5th day of March, 1987.

/s/ HUGH GIBSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C.A. G-83-54

WILLIE LEE BIGFORD

v.

JOE MAX TAYLOR, ET AL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the parable *Before the Law,* Franz Kafka wrote of a man who seeks admitance to "the Law" but perpetually finds his way barred, though he is informed that he may possibly be allowed to enter some day. Try as he might, the man is neither able to find out why he is denied entrance to the Law nor what he must do to gain it. He vainly fritters away his life in this way. Lamentably, *Before the Law* stands not only as an existential parable of alienation, but as a specific parable about the suit of Willie Bigford, Jr.

Mr. Bigford sues Joe Max Taylor, individually and in his official capacity as Sheriff of Galveston County, Texas, and Kenneth Spoor, Art Chapa, and Tommy Hansen, individually and in their official capacities as Deputy Sheriffs of Galveston County. Plaintiff's claim is simple: defendants deprived him of his truck without due process of law. He brings this claim pursuant to 42 U.S.C. § 1983. The Court held a non-jury trial with the consent of the parties on January 12, 1982. The Court concludes that in spite of the fact that plaintiff met a

complete lack of cooperation and competence at every turn, the defendants did not deny plaintiff of due process. The Court rules that plaintiff take nothing from defendants and makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52:

Findings of Fact

1. Early on the morning of July 13, 1982, plaintiff Willie Bigford, Jr. parked his 1977 Chevrolet pickup truck on the shoulder of FM 1764 in Galveston County, Texas. Mr. Bigford was eighteen years old and the truck was his first motor vehicle. Mr. Bigford's truck had just run out of gas. He decided to wait in the truck for the nearest gas station to open and lay down on the truck seat. The truck thus appeared unoccupied when Deputies Spoor and Chapa first observed the truck. Deputy Spoor testified that he stopped to check the "welfare of the truck."

2. The deputies approached the truck and found plaintiff inside the truck. Deputy Spoor asked plaintiff to step out of the truck. Deputy Chapa was merely an observer during the following sequence of events. While the door was open, Deputy Spoor noticed that the Federal Inspection Safety Sticker (FISS), which is required to be affixed to the vehicle body facing the end of the door, was missing. The area where the FISS is required to be affixed is in plain view when the vehicle driver's side door is open. Further investigation indicated that the Vehicle Identification Number (VIN) plate appeared to have been tampered with and that the VIN number stamped into the frame appeared to have been effaced. Tampering with these identification numbers are normally indicia of

a stolen vehicle. However, Deputy Spoor had, by radio, been informed that the truck was not listed as stolen.

3. Deputy Spoor seized the truck and had it towed to a private towing yard. He did not ask plaintiff if the truck had been stolen or if plaintiff had proof of ownership. Plaintiff possessed a certificate of title that the previous owner of record had endorsed to him.

4. Deputy Spoor told plaintiff to ride with him in the patrol car to the station, where he could telephone his parents. At the station, Captain Lease questioned plaintiff for a short time. According to defendants Spoor and Lease, plaintiff was not arrested. Plaintiff testified that he did not believe that he was being detained.

5. Captain Lease completed an inventory of the vehicle and its contents and took the inventory to the district attorney for his signature. On July 14, 1982, the district attorney delivered the inventory to the Galveston County Justice's Court, Precinct No. 4, Judge J. E. Buckner presiding. The inventory was not docketed by the Court until sometime between October 13, 1982 and October 21, 1982. Plaintiff was never served with any notice or citation concerning his truck.

6. Over the next two weeks Mr. Bigford and his parents repeatedly contacted Captain Lease; Deputy Tommy Hansen, the officer conducting the investigation; and Sheriff Joe Max Taylor. Essentially, they were told that the investigation was incomplete and that they would be contacted when it had been established whether the truck was stolen. Captain Lease indicated that this should take approximately thirty days. In fact, it took defendants approximately two months to conclude that the truck had not been stolen.

7. On July 28, 1982, Tommy Hansen told Mr. Bigford to retain a lawyer because the truck had been "turned over" to the courts. Plaintiff retained two lawyers over the next six weeks. Neither took any action.

8. Sometime during the week of September 20, 1982, the Bigfords determined, as a result of their own investigations, which court had jurisdiction over the truck and contacted Judge Buckner. The judge met with the Bigfords and told them that they needed to retain a lawyer who then could petition for a hearing to obtain possession of the truck.

9. The Bigfords, the judge, and the assistant district attorney met the following day. At this and the previous meeting the judge indicated that there was nothing he could do to help.

10. Plaintiff retained attorney Kent Schaffer in October 1982. Mr. Schaffer first contacted the district attorney and unsuccessfully attempted to obtain the release of the truck.

11. Mr. Schaffer then represented Mr. Bigford at the conference held by Judge Buckner on November 18, 1982. The court could not locate a case file or any papers on the Bigford case. An assistant district attorney who was not familiar with the case indicated that Mr. Bigford could obtain his truck by paying the towing and storage fees (approximately $700-$800). Mr. Schaffer represented to the judge that Mr. Bigford could not afford to pay that much and the judge indicated that Mr. Bigford would have to work things out with the district attorney and Deputy Hansen, who was out of town until December. Mr. Schaffer requested a hearing but Judge Buckner told him that they could not have one without

the investigating officer, Tommy Hansen, or the district attorney familiar with the case.

12. Plaintiff did not again demand a hearing, never petitioned for a hearing, and never sought a writ of mandamus to compel the judge to hold one.

13. Neither plaintiff or Mr. Schaffer were notified of any further hearings or conferences.

14. Judge Buckner executed a "Transcript of Judgment" on March 2, 1983 which indicated that the "date of judgment" was December 2, 1982. Neither the Bigfords nor their attorney were served with any notice that judgment was entered.

15. After plaintiff filed this suit in February 1983, the county attorney told plaintiff that he would first have to pay the fees before the truck could be released. The truck was released to plaintiff, without his paying the fees, in December 1985.

16. The value of the truck and its contents before the seizure was between $1,300 and $2,000. While stored, the truck was allowed to deteriorate and defendant Hansen cut a hole in the floor of the cab during the investigation. When the truck was finally returned to plaintiff it no longer ran and its value was approximately $100.

Conclusions of Law

1. This Court has jurisdiction over this § 1983 action pursuant to 28 U.S.C. § 1343.

2. Defendants Spoor and Chapa had reasonable grounds to stop and investigate a vehicle that appeared abandoned on the side of the road. When they discovered that planitiff was asleep in the vehicle, no constitutional

violation resulted from asking plaintiff to step out of the vehicle; from viewing the area where the FISS is required to be located, which is in plain view when the door is open; or from examining the truck for the purpose of inspecting the identification numbers. *See United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980); *United States v. Duckett*, 583 F.2d 1309 (5th Cir. 1978).

3. Deputy Spoor had probable cause to seize it based on the missing and tampered with identification numbers. Texas law prohibits possessing a vehicle that has had the required identification numbers "removed, changed, or obliterated." Tex. Rev. Civ. Stat. Ann. art. 6687-1, § 49 (Vernon's 1977). The FISS and VIN numbers are required by Texas law. *Id.* Such a vehicle is likely to be stolen, which, in fact, is why the legislature enacted article 6687-1.

4. Plaintiff was not arrested. The evidence established that Captain Lease briefly questioned plaintiff but that plaintiff was at no time detained or believed himself detained against his will.

5. Defendants' seizure of plaintiff's truck, which plaintiff owned and possessed, deprived plaintiff of his property.

6. Defendants, however, did not deprive plaintiff of his property without due process. When, as here, a vehicle is seized based upon probable cause, due process only requires an adequate post-seizure hearing. *See Breath v. Cronvich*, 729 F.2d 1006, 1010 (5th Cir. 1984), *cert. denied*, 469 U.S. 934.

7. Such a hearing, in Texas, is provided by the courts, not the sheriff. Chapter 47 of the Texas Code of Criminal

Procedure, Tex. Code Crim. Proc. Ann. arts. 47.01-.11 (Vernon's 1979), sets forth the procedure:

> a. the law enforcement officer files a schedule of the seized property with the magistrate court;
>
> b. he holds the property "alleged to have been stolen" subject to order of the magistrate or court; and
>
> c. an interested party petitions the magistrate or court for possession of the property.

This procedure is essentially the same as the procedure required by Tex. Rev. Civ. Stat. Ann. art. 6687-1, § 49 (Vernon's 1977), under which defendants mistakenly proceeded.

8. Plaintiff had actual notice that his remedy lay with the courts. Plaintiff had adequate legal notice of the published statutory procedures. *See Breath*, 201 F.2d at 1011.

9. Because there was probable cause for the seizure and inventory was filed within 24 to 48 hours of the seizure, defendants did not deprive plaintiff of his property without due process. The Court need not speculate concerning whether the post-seizure hearing would have comported with due process because plaintiff never petitioned for such a hearing. But to the extent that plaintiff's oral requests for possession were a petition, the failure of the magistrate to carry out his legal duties cannot be imputed to defendants. *Cf. Barker v. Norman*, 651 F.2d 1107, 1131 n.27 (5th Cir. 1981) (stating in dictum that arguably there is "no denial of due process for an officer to retain property alleged to have been stolen until after the claimant has availed himself of the mechanisms

provided by state law to establish his entitlement to the property.").

10. Accordingly, the Court concludes that plaintiff take nothing from defendants.

11. If any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. If any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

DONE at Galveston, Texas, this the 5th day of March, 1987.

/s/ HUGH GIBSON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2334

D.C. Docket No. CA-G-83-54

WILLIE BIGFORD, JR.,
Plaintiff-Appellant,

v.

JOE MAX TAYLOR, Individually and as Sheriff of Galveston County, Texas, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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Before CLARK, Chief Judge, GEE and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record and on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part

and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee Deputy Spoor pay to plaintiff-appellant his costs on appeal, and that plaintiff-appellant pay to the other defendants-appellees their costs on appeal, to be taxed by the Clerk of this Court.

January 5, 1988

ISSUED AS MANDATE:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2334

WILLIE BIGFORD, JR.,
Plaintiff-Appellant,

v.

JOE MAX TAYLOR, Individually and as Sheriff of Galveston County, Texas, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITIONS FOR REHEARING

(March 10, 1988)

Before CLARK, Chief Judge, GEE and RUBIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/s/ ALVIN B. RUBIN
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-83-54

WILLIE BIGFORD, JR.,
Plaintiff,

v.

JOE MAX TAYLOR, Individually and as Sheriff of Galveston County, Texas; KENNETH SPOOR, Individually and as Deputy of the Galveston County Sheriff's Department; ART CHAPA, Individually and as Deputy of the Galveston County Sheriff's Department; TOMMY HANSEN, Individually and as Deputy of the Galveston County Sheriff's Department; and GALVESTON COUNTY,
Defendants.

JOINT PRETRIAL ORDER

APPEARANCE OF COUNSEL

The Plaintiff is represented by Beatrice Mladenka-Fowler of Nelson, Locke & Fowler, 3303 Main Street, Suite 300, Houston, Texas 77002-9392, (713) 526-1998.

The Defendants are represented by Scott Lyford, Assistant County Attorney, Galveston County Legal Department, 4127 Shearn Moody Plaza, 123 Rosenberg, Galveston, Texas 77550-1454, (409) 337-2575, extension 348.

* * *

(6) Whether Defendants acted pursuant to policy of Galveston County in seizing and detaining Plaintiff's vehicle without providing prompt post-seizure hearing?

AGREED APPLICABLE PROPOSITIONS OF LAW

(1) 42 U.S.C. § 1983 provides that every person who, under color of any statute, ordinance, regulation, custom or useage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983, The Civil Rights Act of 1871.

(2) The purpose of 42 U.S.C. § 1983 is to provide a civil action to protect against misuse of power possessed by virtue of state law and made possible because the defendant was clothed with the authority of the state. *Jobson v. Henne,* 355 F.2d 129 (2d Cir. 1966).

(3) A person "subjects" another to the deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. *Johnson v. Duffy,* 588 F.2d 740 (9th Cir. 1978).

* * *

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) (en banc), aff'd 735 F.2d 861; *Webster v. City of Houston,* 735 F.2d 838 (5th Cir. 1984) (en banc).

(15) A governmental entity may be held liable for constitutional violations which occur as a result of an official "custom". *Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir. 1984) (en banc), aff'd 735 F.2d 861.

(16) The custom need not be formally approved by governmental officials but must be so well-settled that it is reasonable to infer that it represents official policy. *Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir. 1984) (en banc), aff'd 735 F.2d 861.

(17) Local governments are immune from the payment of punitive damages. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

(18) The individual Defendants are immune from personal liability for damages so long as their conduct did not violate clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982); *Saldana v. Garza,* 684 F.2d 1159 (5th Cir. 1982).

(19) Under Texas law, an act of conversion is completed (1) when the rightful owner demands return of the property and is refused, if the possessor's original possession is not wrongful; or (2) when the person in possession of the property

* * *

impeaching witnesses, the necessity of whose testimony cannot be reasonably anticipated before the time of trial.

Defendants' Witnesses

Defendants anticipate calling those witnesses listed above that Plaintiff does not.

SETTLEMENT

The parties have been unable to reach a settlement agreement. This matter will have to be tried.

TRIAL

The probable length of trial is two days. The witnesses are available upon reasonable notice.

Proposed Findings of Facts and Conclusions of Law will be filed under separate cover.

DONE and ENTERED this ____ day of _____, 1987.

_____

United States District Judge

APPROVAL RECOMMENDED:

/s/ BEATRICE MLADENKA-FOWLER
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NELSON, LOCKE & FOWLER
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ATTORNEY FOR PLAINTIFF

/s/ SCOTT LYFORD
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ATTORNEY FOR DEFENDANTS